



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 13, 2010

Mr. Robert Martinez  
Director-Environmental Law Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2010-10366

Dear Mr. Martinez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 386330 (TCEQ PIR #10.04.26.01).

The Texas Commission on Environmental Quality (the "commission") received a request for the permit applications and all related correspondence regarding permits 47256 and 18897. You state portions of the requested permit applications have been made available to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.<sup>1</sup> You also state release of this information may implicate the proprietary interests of BP Products North America, Inc. ("BP") and Western Refining Company, L.P. ("Western Refining"). Accordingly, you notified BP and Western Refining of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exception you claim and reviewed the submitted information, part of which you have marked as a representative

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<sup>1</sup>Although you also raise section 552.111 of the Government Code, you have not submitted any arguments regarding the applicability of this exception. Therefore, this decision does not address section 552.111. *See* Gov't Code §§ 552.301(e)(1)(A) (governmental body must submit written comments stating why claimed exceptions apply to information at issue), .302.

sample.<sup>2</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we must address the commission's obligations under section 552.301 of the Government Code. Section 552.301(b) requires a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request." *Id.* § 552.301(b). You did not raise section 552.101 within the ten-business-day deadline. However, section 552.101 is a mandatory exception that cannot be waived by a governmental body. *See* Gov't Code § 552.352; Open Records Decision No. 574 at 3 n.4 (2001) (mandatory exceptions). Because section 552.101 is a mandatory exception, we will consider your argument under section 552.101 notwithstanding your violation of section 552.301(b) in raising that exception.

You claim the submitted information is subject to section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information made confidential by other statutes, including section 382.041 of the Health and Safety Code, which provides "a member, employee, or agent of the commission may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted." Health & Safety Code § 382.041(a). This office has concluded section 382.041 protects information that is submitted to the commission if a *prima facie* case is established that the information constitutes a trade secret under the definition set forth in the Restatement of Torts and if the submitting party identified the information as being confidential when submitting it to the commission. *See* Open Records Decision No. 652 (1997).

You state BP and Western Refining marked the submitted documents as confidential when they provided them to the commission.<sup>3</sup> However, as of the date of this letter, BP and

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<sup>2</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

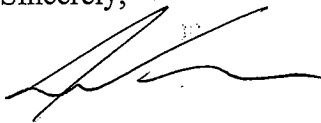
<sup>3</sup>We note that information is ordinarily not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110).

Western Refining have not submitted comments to this office asserting any of their information constitutes a trade secret. *See* Gov't Code § 552.305(d)(2)(B) (interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure). Therefore, we have no basis to conclude any of the submitted information constitutes a trade secret of BP or Western Refining. *See id.* § 552.110; Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the commission may not withhold any of the submitted information under section 552.101 in conjunction with section 382.041. Moreover, because BP and Western Refining have failed to submit any arguments to our office, we have no basis to conclude release of any portion of their information would cause either company substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm). Consequently, the commission may not withhold any of the submitted information based on the proprietary interests BP or Western Refining may have therein. As you raise no other exceptions against disclosure of the submitted information, it must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/eeg

Ref: ID# 386330

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: Requestor  
(w/o enclosures)

c: BP Products North America, Inc.  
2401 5<sup>th</sup> Avenue S.  
Texas City, Texas 77590-8349  
(w/o enclosures)

c: Mr. Kenneth Jinkerson  
Western Refining Company, L.P.  
6501 Towbridge Drive  
El Paso, Texas 79905-3401  
(w/o enclosures)